Consolidated Delivery & Logistics, Inc. *and* Teamsters Local Union No. 418, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Case 22–CA–23543

May 15, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On August 3, 2000, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

The judge found that the Respondent violated Section 8(a)(3) and (1) by discharging employees who engaged in a strike for recognition of the Union. The judge also found that the Respondent violated Section 8(a)(3) and (1) by failing and refusing to reinstate strikers on their unconditional offers to return to work. For the reasons stated below, we agree.

I. FACTS

The relevant facts can be summarized as follows. The Respondent is engaged in the business of providing driving and delivery services at multiple jobsites. In 1999, its customers included Neuman Distributors, Inc. (Neuman), which distributes pharmaceutical products. Pursuant to a contract with Neuman, the Respondent performed deliveries for Neuman out of Neuman's Teterboro, New Jersey facility. The Respondent's Neuman jobsite was a "dedicated customer site," meaning that the Respondent operated on the customer's premises.

In late July 1999,[2] Alfred Pascarella, the Charging Party's president, received a phone call advising him that the Respondent's drivers wanted union representation. Pascarella met with the drivers, obtained authorization cards, and recommended that if the Respondent refused to recognize the Union, the drivers should strike for recognition.

On the morning of Friday, August 6, Pascarella requested recognition from the Respondent. The Respondent refused, and the drivers began a strike and established a picket line. The picket line remained in place until about 3 p.m. None of the Respondent's approximately 32 drivers at the Neuman site worked that day.

At approximately 4 p.m., the Respondent gave the drivers a letter, which stated in part:

> This is to advise you that because you abandoned your job today, Friday, August 6, 1999 and refused to work, you have been permanently replaced. Your job will be performed by others.

It is undisputed that at the time the letter was distributed, the Respondent had not hired any replacements or even made contact with the employment service that it now contends replaced the drivers.

On Friday evening and on Saturday, some of the Respondent's drivers who had struck on Friday asked to return to work. The Respondent reinstated them.

During the Friday picketing, Neuman told the Respondent to use whatever means necessary to get Neuman's product delivered. Neuman gave the Respondent permission to use independent contractors as drivers, even though Neuman had previously required the Respondent to use employee drivers. On Friday or Saturday, the Respondent decided that it wanted to subcontract the driving work to a third party. On Sunday, August 8, Robert Wyatt, the Respondent's Northeast Regional President, spoke for the first time with Edward Eusebio, a representative of Labor Ready. Labor Ready was an employment agency engaged in supplying labor to businesses. Wyatt testified that he arranged for Labor Ready to supply drivers to the Respondent's Neuman site beginning Tuesday, August 10. Wyatt said that he arranged for Eusebio to send drivers who would "remain at work," not "day laborers," because of the "training curve" associated with the Respondent's routes. Neither Eusebio nor any Labor Ready driver or representative testified about their understanding of Labor Ready's arrangement with the Respondent. However, Labor Ready records introduced at the hearing show that some of the Labor Ready drivers (particularly those supplied in the days immediately following the strike) worked only a single day or a few days. The Respondent did not enter into a written contract with Labor Ready, and it is undisputed that the Respondent could stop using Labor Ready at any time simply by telling Labor Ready not to send drivers the following day.

During the weekend of August 7 and August 8, and on Monday, August 9, the Respondent covered its routes by using the striking drivers who had been reinstated over the weekend, drivers who had been absent from work on August 6 for illness or reasons other than the strike, and a

[1] We will substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[2] All dates are in 1999 unless otherwise specified.

few drivers who worked for the Respondent at its other locations.

On Monday, August 9, 11 strikers, who had not already requested reinstatement over the weekend, telephoned or came to the Respondent's Neuman site and asked to return to work. They were not reinstated. Two other strikers, Richard Jeans and Luis Ortiz, also were not reinstated, although the record contains no evidence that they requested reinstatement. Jeans, Ortiz, and the 11 drivers who requested reinstatement on August 9 are the drivers whom the General Counsel alleges, and the judge found, were refused reinstatement in violation of Section 8(a)(3) and (1).

On Tuesday, August 10, Labor Ready supplied drivers to the Respondent. The Respondent operated using those drivers and the strikers who had been reinstated over the weekend. The Respondent continued to operate in this manner through February 2000, when Neuman terminated the Respondent's contract.

II. ANALYSIS

A. Discharge of the Strikers in Violation of Section 8(a)(3) and (1)

We agree with the judge that the Respondent discharged the striking drivers in violation of Section 8(a)(3) and (1) by distributing a memorandum on August 6 telling the strikers they had been permanently replaced. The Board has held, and the courts have affirmed, that advising economic strikers that they have been permanently replaced when they have not been replaced constitutes a discharge in violation of Section 8(a)(3) and (1).[3]

The District of Columbia Circuit's decision in *Noel Foods v. NLRB*, 82 F.3d 1113 (D.C. Cir. 1996), does not require a contrary finding. In *Noel Foods*, the employer was aware that employees planned to begin an economic strike at midnight. At about 10 p.m., the employer told employees that the company had hired permanent replacements and that employees who struck at midnight would be permanently replaced. The court concluded that these statements did not constitute an unlawful discharge. In doing so, the court stated that the relevant question was not whether the employer's statement that it had hired permanent replacements was "false when made," but "whether the statement conveyed the impression that the employees would be replaced as soon as they went on strike *and whether they were in fact replaced at that time.*" Id. at 1119 (emphasis added). The court emphasized that Noel Foods had previously contracted with an employment agency to prepare a roster of people ready to serve as replacements, and in fact a number of replacement workers had actually reported for work before midnight, when the strike began. Under those circumstances, the court held that the employer's statements did not effectively discharge the strikers before their positions were actually filled by replacements. See id. at 1119–1120.

By contrast, in this case, the Respondent distributed the memorandum to the strikers on the afternoon of August 6, stating unambiguously that "you have been permanently replaced." It is undisputed that the Respondent's first contact with Labor Ready occurred 2 days later, on August 8. Unlike the employer in *Noel Foods*, which had made prior arrangements to obtain replacements and actually had replacements ready and waiting when the strike began, in this case the Respondent had not even made contact with Labor Ready at the time it told the strikers they had been permanently replaced. Accordingly, we agree with the judge that the Respondent discharged the strikers on August 6 in violation of Section 8(a)(3) and (1).[4]

B. Refusal to Reinstate 13 Strikers in Violation of Section 8(a)(3) and (1)

We further agree with the judge that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate 13 of the strikers. The Respondent argues that it was not required to reinstate the strikers because it permanently replaced them by engaging Labor Ready as a permanent subcontractor. For the reasons stated below, we reject this argument.

It is well settled that an employer violates Section 8(a)(3) and (1) if it fails to reinstate strikers on their unconditional offers to return to work, unless the employer can establish a "legitimate and substantial business justifi-

[3] See, e.g., *American Linen Supply Co.*, 297 NLRB 137 (1989) ("an employer who inform[s] lawful economic strikers that they ha[ve] been permanently replaced when in fact the employer ha[s] not obtained such replacements, ha[s] thereby terminated the strikers in violation of Sec. 8(a)(3) and (1) of the Act"; therefore, memorandum telling employees they would be permanently replaced at 7 a.m., when no replacements had been obtained by that time, effected an unlawful discharge), enfd. 945 F.2d 1428 (8th Cir. 1991); *Mars Sales & Equipment Co.*, 242 NLRB 1097, 1100–1101 (1979) (letter advising strikers that respondent had "hired a permanent replacement for your position," when the replacement workers were not permanent, constituted an unlawful termination in violation of Sec. 8(a)(3) and (1)), enfd. in relevant part 626 F.2d 567 (7th Cir. 1980); *W.C. McQuaide, Inc.*, 237 NLRB 177, 179 (1978) ("as we have found in agreement with the Administrative Law Judge that 15 of the 24 asserted permanent replacements were not bona fide, we adopt his finding that the May 17 letter to the striking dockworkers advising them that they had been permanently replaced constituted an unlawful termination"), enfd. 617 F.2d 349 (3d Cir. 1980).

[4] In concluding that the strikers were unlawfully discharged, we find it unnecessary to rely, as the judge did, on the documents filed on the Respondent's behalf with the New Jersey Department of Labor in response to unemployment claims by strikers Avelino Rodriguez and Philip Torres.

cation" for failing to do so. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). The employer bears the burden of proving the legitimate and substantial business justification. See id. An employer's permanent replacement of economic strikers as a means of continuing its business operations during a strike is a legitimate and substantial business justification. See, e.g., *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938).

The employer, however, bears the burden of proving the permanent status of the replacements. "Significant in meeting this burden is an adequate showing that there was a mutual understanding between the employer and the replacements that the nature of their employment was permanent." *Target Rock Corp.*, 324 NLRB 373 (1997), enfd. 172 F.3d 921 (D.C. Cir. 1998); and *Harvey Mfg.*, 309 NLRB 465, 468 (1992). The Respondent must establish "that the replacements were hired in a manner that would 'show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis.'" *Target Rock*, 324 NLRB at 373 (quoting *Georgia Highway Express*, 165 NLRB 514, 516 (1967), affd. sub nom. *Truck Drivers & Helpers Local 728 v. NLRB*, 403 F.2d 921 (D.C. Cir. 1968), cert. denied 393 U.S. 935 (1968)). Absent evidence of a mutual understanding, the Respondent's own intent to employ the replacements permanently is insufficient. *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987).

First, we agree with the judge that the Respondent failed to prove that the individual workers supplied by Labor Ready were permanent replacements. There is no evidence of a mutual understanding between the Respondent and any of the Labor Ready workers that they were being hired on a permanent basis. No Labor Ready worker testified, and none of the Respondent's representatives testified to discussions with the individual Labor Ready workers. The Respondent conceded that it could tell Labor Ready at any time that it did not want a particular worker to return. Furthermore, Labor Ready's records show substantial turnover among the workers it supplied to the Respondent, particularly in the days immediately following the strike. Some Labor Ready drivers worked only a single day. Accordingly, we agree that the Respondent did not carry its burden to prove that the individual Labor Ready drivers permanently replaced the strikers.[5]

Second, we reject the Respondent's argument that it permanently replaced the strikers by engaging Labor Ready itself (as distinguished from the individual Labor Ready drivers) as a permanent subcontractor. We find, for reasons similar to those stated above, that the Respondent failed to prove that its arrangement with Labor Ready was a permanent one.

Under the principles set forth above, to establish this defense, the Respondent must prove a mutual understanding with Labor Ready that it was to provide drivers on a permanent basis. However, no representative of Labor Ready testified about his or her understanding of the arrangement with the Respondent.[6] Robert Wyatt, the Respondent's northeast regional president at the time of the strike, conceded that the Respondent had no written agreement with Labor Ready. The Respondent's witnesses also conceded that the Respondent could cease using Labor Ready's services at any time simply by telling Labor Ready not to send any drivers the next day.

Robert McKim, the Respondent's regional director, testified as follows about his understanding of the arrangement with Labor Ready and the events leading up to it:

> A. You've got to understand the nature of what was going on. From Friday's chaos to us trying to run a smooth operation on Monday . . . Robert [Wyatt] had reached out to get us some additional labor to provide delivery, so it's not a corporate policy. It was an individual decision for this, for Tuesday, the 10th.
>
> Q. And the 11th.
>
> A. Right.
>
> Q. And the 12th.
>
> A. Right.
>
> Q. And the 13th.
>
> A. Right.
>
> Q. And all subsequent weeks, correct?
>
> A. That's how it worked out, yes.

[5] In doing so, we do not rely on the judge's finding that the strikers' positions had not been filled on Monday, August 9, because Labor Ready workers had not yet physically arrived on the job. Had the Respondent actually reached a mutual understanding with the Labor Ready workers that they were permanent, then the strikers' positions would have been filled as of the time the Respondent made, and the replacements accepted, a commitment for permanent employment. See *Solar Turbines Inc.*, 302 NLRB 14 (1991), affd. sub nom. *Machinists v. NLRB*, 8 F.3d 27 (9th Cir. 1993). As stated above, however, we find that the Respondent failed to prove a mutual understanding that the Labor Ready replacements were permanent.

[6] Both the Respondent and the General Counsel subpoenaed Edward Eusebio, the Labor Ready representative that Wyatt contacted to supply drivers to the Respondent. Eusebio did not appear at the hearing, and the judge admitted Eusebio's prehearing affidavit over the Respondent's objection. The Respondent excepts to the admission of the affidavit. We find it unnecessary to rely on the affidavit in concluding that the Respondent failed to prove that it contracted with Labor Ready to provide drivers on a permanent basis. Accordingly, we need not pass on the Respondent's exception to the admission of the affidavit.

McKim further testified that the Respondent's plan "was day to day up until Tuesday," August 10, the first day on which the Respondent used Labor Ready, "and then Tuesday ran well and we continued with it."

The Respondent's evidence falls far short of establishing that its arrangement with Labor Ready was a permanent one. To the contrary, the testimony of the Respondent's own regional director suggests that the subcontracting began on a temporary (or "day to day") basis and then was simply "continued" because it "ran well." Wyatt did testify that he arranged for Labor Ready to send drivers who would "remain at work," rather than "day laborers." However, this establishes only that the Respondent did not want turnover among the Labor Ready workers, and it is consistent with a temporary arrangement as well as a permanent one.[7]

Accordingly, we find that the Respondent failed to prove that it permanently replaced the strikers by entering into a permanent subcontract with Labor Ready.[8] Therefore, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) by failing and refusing to reinstate the strikers on their unconditional offer to return to work.[9]

C. Remedial Issues

We agree with the judge's recommended Order with the following modifications and qualifications.

First, we shall modify the judge's recommended Order to reflect that all strikers discharged on August 6, 1999 (including those who were later refused reinstatement) shall be made whole from the date of the unlawful discharge.

Second, the Respondent argues that it closed the Neuman site in February 2000, that the record is silent on whether the Respondent typically transferred employees within its system, and that the Respondent therefore should not be required to reinstate the strikers unless it reopens the Neuman site. We find that this issue is better suited to resolution in the compliance process, during which the Respondent may introduce evidence regarding the appropriateness of reinstatement. Accordingly, we shall issue our standard reinstatement order requiring the Respondent to reinstate the discriminatees to their former positions or, if those positions no longer exist, to substantially equivalent positions.

Third, because there is no evidence that the Respondent's unfair labor practices impacted on, or became known to, employees outside the Respondent's Neuman jobsite, or that the unfair labor practices were committed pursuant to a company policy or otherwise reflected a pattern or practice of unlawful conduct, we shall modify the judge's recommended Order to require that the Respondent mail copies of the notice only to those current and former employees who were employed at the Neuman site at any time since August 6, 1999. See *Consolidated Edison Co. of New York*, 323 NLRB 910, 911–912 fn. 8 (1997).

Finally, we shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

ORDER

The Respondent, Consolidated Delivery & Logistics, Inc., Teterboro, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in a lawful economic strike, or for supporting Teamsters Local Union No. 418, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO, or any other union.

(b) Failing or refusing to reinstate striking employees to their former or substantially equivalent positions of employment in the absence of a legitimate and substantial business justification.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, if the Respondent has not already done so, offer those employees who were discharged on August 6, 1999, and the following employees who were refused reinstatement on August 9, 1999, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any

[7] In any event, despite Wyatt's wishes, it is clear from Labor Ready's records that there was turnover among the workers Labor Ready supplied, particularly in the days immediately following the strike.

[8] Because we find that the Respondent did not prove that its subcontract was permanent, we need not reach the issue of whether, had such a permanent arrangement been entered into, the Respondent established a legitimate and substantial business justification for refusing to reinstate the strikers. See *Capehorn Industry*, 336 NLRB 364, slip op. 4 (2001) (where permanent subcontracting is used as justification for refusing to reinstate economic strikers, employer must establish a legitimate and substantial business justification for the permanent subcontracting).

[9] For the reasons stated by the judge, we agree that the Respondent failed to prove its affirmative defense that the strike was unlawful under Sec. 8(b)(4)(D). Also for the reasons stated by the judge, we agree that strikers Richard Jeans and Luis Ortiz, who were among the strikers unlawfully discharged on August 6, are entitled to reinstatement and backpay despite the fact that the record does not establish that they made unconditional offers to return to work.

other rights or privileges previously enjoyed, dismissing, if necessary, any persons engaged as replacements.

Jose Balazar	Isaac Rosario
Fabian Guevera	Jose Salinas
Juan Guzman	Richard Silva
Richard Jeans	Jose Torres
David Maldonado	Philip Torres
Luis Ortiz	Miguel Vega
Avelino Rodriguez	

(b) Make all employees who were discharged on August 6, 1999 (including those employees listed above, who were also refused reinstatement) whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Make the employees listed above, who were refused reinstatement on August 9, 1999, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and the unlawful refusals to reinstate, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and the refusals to reinstate will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Teterboro, New Jersey, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at its Neuman site at any time since August 6, 1999.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in a lawful economic strike, or for supporting Teamsters Local Union No. 418, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO, or any other union.

WE WILL NOT fail or refuse to reinstate striking employees to their former or substantially equivalent positions of employment in the absence of a legitimate and substantial business justification.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

If we have not already done so, WE WILL, within 14 days of the date of the Board's Order, offer those employees who were discharged on August 6, 1999, and the following employees who were refused reinstatement on August 9, 1999, full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, dismissing, if necessary, any persons engaged as replacements.

Jose Balazar	Isaac Rosario
Fabian Guevera	Jose Salinas
Juan Guzman	Richard Silva
Richard Jeans	Jose Torres
David Maldonado	Philip Torres
Luis Ortiz	Miguel Vega
Avelino Rodriguez	

WE WILL make those employees who were discharged on August 6, 1999 (including those employees listed above, who were also refused reinstatement), whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL make the employees listed above, who were refused reinstatement on August 9, 1999, whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges and the unlawful refusals to reinstate, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges and refusals to reinstate will not be held against them in any way.

CONSOLIDATED DELIVERY & LOGISTICS, INC.

Patrick Daly and *Jeffrey Gardner, Esqs.*, for the General Counsel.

Jedd Mendelson and *Shaun Reid, Esqs. (Grotta, Glassman & Hoffman, P.A.)*, of Roseland, New Jersey, for the Respondent.

David Grossman, Esq. (Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano, P.C.), of Kenilworth, New Jersey, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge filed on August 31, 1999,[1] by Teamsters Local 418 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO (Local 418 or Union), a complaint was issued on December 30 against Consolidated Delivery & Logistics, Inc. (Respondent).

The complaint alleges that on August 6, Respondent discharged all of its employees who engaged in a strike that day, and on August 9, when 13 named strikers made unconditional offers to return to work, it failed and refused to reinstate them.

Respondent's answer denied the material allegations of the complaint, and its amended answer asserted the affirmative defense that the strikers were engaged in unprotected conduct. On March 14 and 15, 2000, a hearing was held before me in Newark, New Jersey. On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties, I make the following.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation having an office and place of business in Teterboro, New Jersey, has been engaged in the business of providing delivery services. In the 12 months preceding the issuance of the complaint, Respondent has derived gross revenues in excess of $50,000 from its operations which include the transportation of freight from New Jersey directly to points outside New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Neuman Distributors, Inc. (Neuman) has a warehouse and facility in Teterboro, New Jersey, from which it delivers medicine, medical supplies, and hospital products to pharmacies and hospitals. The nature of the product is "time sensitive, critical" and includes certain items which must be refrigerated, and high value pharmaceutical materials which must be delivered on the day they are ordered. Neuman employs warehousemen and truck drivers at that location. Those workers are represented by the Union which has separate collective-bargaining agreements with Neuman for those units.

Respondent operates a trucking delivery service for Neuman at the Teterboro location which delivers the same types of products to the same types of customers as Neuman does. In the spring or early summer of 1999, Respondent began its operation at Neuman's Teterboro facility.

In late July, Union President Alfred Pascarella Jr. received a phone call advising him that Respondent's drivers wanted union representation. Pascarella held meetings with the employees on July 23 and 26 during which he obtained signed authorization cards. He recommended, and they agreed, that if Respondent refused to recognize the Union a strike for recognition should be conducted, and that they would not work until the Union was recognized.

Before the start of the workday on August 6, Pascarella visited the facility and told Branch Manager Ravi Beedoo that the Union represented a majority of Respondent's employees and asked that the company recognize the Union and sign a recognition letter. Beedoo said he did not have the authority to sign the letter. Pascarella informed him that the men would not work until he was given an answer.

Shortly thereafter, Pascarella asked Respondent's regional vice president, Robert Wyatt, to sign the recognition letter, adding that if it was not signed the men would not work. Wyatt refused and suggested that the Union utilize the Board's election process. Wyatt added that he doubted that the Union represented a majority of the drivers to which Pascarella said that

[1] All dates hereafter are in 1999 unless otherwise stated.

he would show him that the Union represented the workers. A picket line was established and signs carried by three to six workers said: "Teamster Local 418 on strike for recognition with CD & L. Unfair to organized labor." None of Respondent's approximately 32 drivers present at the facility worked that day.

During the picketing, Respondent's regional director, Robert McKim, arrived at the facility and heard Pascarella make a demand for recognition. He and Beedoo attempted to speak to the strikers in order to ask them to return to work but were prevented from doing so by Pascarella who intervened and interfered with their talking to the workers. Pascarella advised McKim to speak to him (Pascarella), not the strikers.

The drivers employed by Neuman also did not work when the picket line was established. The Union's collective-bargaining agreement with Neuman provided that they could honor the Union's picket line.

In the afternoon of August 6, Samuel Toscano, the chairman of Neuman, gave Pascarella a letter which stated that Pascarella would be held liable for damages due to the stoppage of work by Neuman's drivers. Pascarella then withdrew the picket line and directed Neuman's drivers to return to work. Pascarella was ordered to leave the facility and he did so after telling Respondent's drivers to meet him off the premises.

During that day, the following letter, signed by Beedoo and McKim, was given to each of the strikers present at the facility:

> This is to advise you that because you abandoned your job today, Friday August 6, 1999 and refused to work, you have been permanently replaced. Your job will be performed by others.

There is a disagreement as to when the letter was presented. Pascarella stated that in the early afternoon, between 1 and 3 p.m. during the picketing the drivers were told that they were terminated and were given the letter. I credit McKim's testimony that since August 6 was a payday, the strikers were given the letter as they received their paychecks and left the facility at about 4 p.m. following the withdrawal of the picket line. No employee testified that he was told that he was discharged, and I do not credit Pascarella's testimony in that regard. My finding here that the strikers were discharged is based on the letter they received and the unemployment compensation documents, to be discussed below.

At their meeting later that day, some employees told Pascarella that they had been asked by Respondent to return to work. He advised them to do so. They agreed to meet again on Monday. When they met on Monday, some employees reported that they had been asked by Respondent to return to work, and others said that they were offered reinstatement which they accepted.

McKim testified that late Friday afternoon, August 6, he offered his opinion to the president of Respondent and its attorney that although he preferred to reinstate all the drivers, he had unsuccessfully attempted to have them return to work that day. Accordingly, since Respondent had a contractual obligation to deliver Neuman's product, he believed that the drivers must be replaced with those willing to perform the jobs. McKim emphasized that he did not intend to terminate the drivers, but rather replace them with others who would make the deliveries.

Respondent operated a guaranteed minimum of 32 routes, but sometimes as many as 42 routes for Neuman. Immediately prior to the strike, Respondent was doing 36 to 37 routes with 35 or 36 employees and 3 or 4 independent contractors.

In the evening of August 6, Neuman removed 10 routes from Respondent "indefinitely" and advised that it would be operating them with its own drivers. Accordingly, Respondent had about 26 routes to perform immediately following the end of the picketing. On Friday, deliveries were made with its dispatchers and with independent contractors who worked for Respondent at its other facilities. Those additional independent contractors continued to work on Saturday and Monday. They did not work on Tuesday since the routes were covered by Respondent's returning drivers, the regular 3 to 4 independent contractors and drivers obtained from the Labor Ready employment agency.

On Friday evening, August 6, certain of Respondent's drivers called or visited the facility, asking to return to work. They were given routes to be performed the following day and on Monday.[2] McKim assigned work for Saturday to all its drivers, about 15 to 17, who asked to return to work on Friday, and also to those who had been absent on Friday due to vacations or sick leave, and a couple of independent contractors who work for Respondent in other facilities, and also Respondent's drivers from its other locations. Those same individuals worked on Monday also. Neuman's drivers were doing the 10 routes removed from Respondent's jurisdiction.

Wyatt stated that on Friday or Saturday, a decision had been made by Respondent to subcontract the labor to a third party source. On Sunday, August 8, Respondent's official, Robert Wyatt, called Edward Eusebio, the branch manager for Labor Ready, a temporary employment agency and asked for drivers who could be trained to learn routes and prepare documentation in connection with their deliveries.[3] Wyatt stated that he asked for people who would remain at work, not day laborers, because of the training period necessary for drivers to learn the routes. He requested workers to begin on Tuesday, August 10. There were openings for 8 to 10 drivers but additional workers were requested from Labor Ready so that there would be two employees on each truck so that if one decided not to keep the job the other would already be familiar with the route. However, it was not contemplated that those extra employees would be needed for a long period of time.[4]

Eusebio's affidavit states that Labor Ready is an employment agency which provides temporary help to businesses. Employees referred are paid by Labor Ready on a daily basis

[2] Respondent's drivers work Monday through Friday. The Saturday, August 7 schedule was implemented in order to deliver the product which had not been delivered on Friday.

[3] The General Counsel's argument that Wyatt did not call Labor Ready until Monday, August 10 is irrelevant. It is undisputed that contact with Labor Ready had been made on Sunday, whether by an attorney for Respondent or by Wyatt and at that first contact an order had been made for drivers.

[4] McKim stated that at least six Labor Ready drivers worked on Tuesday.

and are paid at the end of the workday at the Labor Ready facility which sends them to work.[5] Eusebio stated that neither Respondent attorney McEwain nor any other representative of Respondent requested that Labor Ready provide drivers on a permanent basis. Labor Ready employs a system whereby the contractor company notes on a Labor Ready job ticket each day whether it wants that employee to return to work the next workday.

Eusebio was subpoenaed by the General Counsel and Respondent. He did not appear at the hearing. His pretrial affidavit, taken by a Board agent, was received in evidence over Respondent's hearsay objection. "The Board has long held that it will admit hearsay evidence if rationally probative in force and if corroborated by something more than the slightest amount of other evidence." *Dauman Pallet, Inc.*, 314 NLRB 185, 186 (1994). Here, the statements set forth in Eusebio's affidavit are clearly probative of the issue concerning whether the replacements were permanent or temporary. The above statements are also corroborated by other evidence of the temporary nature of the replacements, which will be summarized below.

Wyatt stated that in addition to the strikers who requested reinstatement on Friday, others asked to return to work on Saturday, and all who requested their jobs on those 2 days were reinstated. All such employees, who Wyatt estimated were half the prestrike work force, were employed on routes on Saturday.

McKim stated that Respondent had few deliveries to make on Monday and needed few drivers since orders which would ordinarily have been placed on Friday, were not placed because of the strike.

On Monday morning, August 9, 11 of Respondent's drivers who had not offered to return to work came to the facility and told McKim that they wished to go back to work. McKim told them that work for that day had already been assigned and dispatched and there was no work for them. Respondent had used the same drivers it had used 2 days before, on Saturday, August 7. McKim stated that he did not tell the inquiring drivers to return Tuesday for work because Respondent "did not have a plan" and did not know what its operations would require after Monday. McKim wrote the names and phone numbers of the drivers on a "replacement list" and told them that he would contact them as the company had a need for their services.

McKim testified that he learned from Neuman on Monday afternoon that the volume of work would increase on Tuesday. Nevertheless, he did not recall Respondent's drivers from the list to report to work on Tuesday. He stated that Respondent's "plan" was to operate with Labor Ready and avoid further "chaos" which he experienced during the strike. Wyatt stated that he discussed with his fellow managers the possibility that if they reinstated the drivers the strike could resume at a later time. McKim said that the work was performed well on Tuesday and the company decided to continue using Labor Ready although Respondent had the ability to terminate Labor Ready's services at any time.

The 13 individuals on the replacement list comprise all those set forth in the complaint as having been denied reinstatement following their unconditional offers to return on August 9. They are Jose Bazalar, Fabian Guevera, Juan Guzman, Richard Jeans, David Maldonado, Luis Ortiz, Avelino Rodriguez, Isaac Rosario, Jose Salinas, Richard Silva, Jose Torres, Philip Torres, and Miguel Vega. However, Jeans and Ortiz did not make an offer to return in person. Their names were added to the list by McKim as representing those who Respondent did not return to work or had not contacted the company.

Wyatt testified that although the drivers who requested reinstatement on Monday were experienced, McKim acted pursuant to his instructions that they not be reinstated. The reason for their refusal of reinstatement was because Neuman gave Wyatt a "window of opportunity" to change the nature of Respondent's operation from one in which employees worked for Respondent to one in which independent contractors could be utilized. Wyatt sought to take advantage of that opportunity for the reasons discussed below. Wyatt further explained that had those drivers called or returned on the weekend to advise that they would return to work on Monday, they would have been reinstated just as the other drivers had. However, during the weekend alternative arrangements had to be made to ensure service on Monday. Accordingly, when they requested reinstatement on Monday, their requests were denied.

That Sunday, August 8, Wyatt told McKim that Labor Ready drivers would be used beginning Tuesday. Accordingly, McKim could not have known on Sunday that Respondent's drivers would appear at its facility on Monday morning requesting reinstatement. The decision had already been made to replace them.

This is supported by a payroll list bearing the notation of "8–7–99" next to 15 names. Those 15 include the 13 individuals named in the complaint as having been refused reinstatement on August 9 after their offers to return to work. McKim stated that August 7 was the date those individuals were permanently replaced. Wyatt stated that the statement in the letter that employees were replaced meant that he had no expectation of reinstating them but he believed that he had the ability to reinstate them if they requested reinstatement.

Wyatt stated that he was told by counsel that if any of the replacement workers they hired left Respondent's employ, it would be required to offer those jobs to those employees who requested reinstatement on Monday, August 9. However, that advice was not followed.

Wyatt conceded that the "ideal situation" was to employ "experienced drivers," and not Labor Ready workers. However, he later stated that even experienced drivers were untrained at one time. Nevertheless, on the weekend of August 8 and 9, the 13 drivers had not requested reinstatement and he therefore made arrangements with Labor Ready. Although he could have terminated the Labor Ready drivers at any time, and particularly on Monday when the 11 drivers presented themselves, he chose not to because he had determined to change the nature of the workforce from employees to independent contractor or labor provider source.

Wyatt stated that it was not necessary that a Labor Ready driver be asked to return the next day. Rather, the arrangement that was made was that Labor Ready would send the same number of drivers each day. He also requested that the same individuals be sent each day, but could not recall if in fact the

[5] McKim and Wyatt also stated that Labor Ready pays the drivers.

same people returned each day. He conceded that in the first couple of days there was some turnover of Labor Ready employees and a certain period of time elapsed until a "core group" of steady workers was employed.

Wyatt testified that Respondent's Teterboro operation for Neuman was unusual in that most of its labor was comprised of its own employees and its own vehicles at Neuman's request. In contrast, Respondent's other facilities used independent contractors.

Wyatt seized on the opportunity presented by the strike to convert the Teterboro operation to one in which the work was performed by independent contractors since nearly the entire northeast region of Respondent utilized independent contractors, and that he preferred those workers to people on the payroll of Respondent. He stated that his reason for preferring independent contractors was purely economic—no investment in vehicles was required, the absence of unemployment insurance, and benefits such as sick leave and paid holidays, and a more productive work force in the independent contractors who have a financial incentive in their work.

Wyatt stated that McKim had the authority to reduce the number of Labor Ready drivers so that he could hire from the replacement list but such an action would have been contrary to Wyatt's instructions which were to replace Labor Ready's drivers with more Labor Ready drivers and not those from the replacement list. Wyatt later contradicted that testimony by stating that he did not tell McKim that he would not hire from the replacement list even if he stopped using Labor Ready. He conceded, however, that he did not want to hire from the replacement list, but that if he no longer wanted Labor Ready he would consider using the list. The reason he preferred not using the list was that he wanted to continue using independent contractors and third party labor such as Labor Ready. Wyatt's authority to replace Respondent's employees with Labor Ready workers or independent contractors derived from Neuman officials telling him that he could do whatever he had to get the product delivered. He was specifically told by Neuman that Respondent could use independent contractors and subcontract the delivery work.

On August 27 the Union filed a petition for representation of Respondent's drivers with the Board. Labor Ready continued to provide drivers to Respondent until Neuman terminated its contract with Respondent in February 2000. An election was scheduled on the Union's petition, but on March 3, 2000, the Union withdrew its petition because of the layoff of all eligible voters due to Respondent's loss of its contract with Neuman.

B. The Replacement Drivers

As set forth above, Respondent engaged Labor Ready to supply drivers beginning on Tuesday, August 10. The drivers are paid by Labor Ready at the end of each workday.

Labor Ready's payroll covering the period August 10 through November 23 indicates that 5 drivers began work on August 10. They were John Caraballo, Timothy Craig, John Hogen, Troy Hutton, and Joseph Pagan. Of those, only Pagan worked continuously thereafter through November 22, the last date of the payroll received in evidence. Caraballo worked through November 10. Craig's total employment consisted of 2 days in the week of August 10, Hogen worked 3 days, and Hutton worked 4 days that week and 1 day the following week.

Other employees began work shortly thereafter but were employed briefly. For example, Matthew Marsh worked on August 11 only, Michael Nerlino's sole day of employment was on August 12, and Paul Lawrence began work on August 11 and worked regularly thereafter until October 13. Victor Ponce apparently replaced him, beginning work on October 14 and working through November 23.

Luis Gil began work on August 18 and worked only until September 9.

Robert Mitchell began work on August 18 and worked continuously until November 23. Jose Ramos began work on August 23 and worked regularly until October 5. Abdel-Hamid Anjer's only day of employment was September 30. Oscar Moreno began work on October 26 and worked until November 9. Eric Medina began work on November 3 and was still employed on November 23, the last payroll date in evidence. Mustapa Othman started work on November 9 and has continued to work through November 23. Edward Bennett's only day of employment was on November 18.

C. The Unemployment Compensation Documents

Respondent is represented by a company called Consultech in cases which its employees file claims for unemployment compensation. In early August, claims were filed by employees Avelino Rodriguez and Philip Torres. In documents filed with the New Jersey Department of Labor, Consultech's "agent," Mary Bardelli, wrote that Consultech represented Respondent pursuant to a power of attorney filed with that agency. Bardelli's response to the claims of the employees was that "the claimant is no longer employed for the following reason: Insubordination—work stoppage due to nonrecognition of promotion of union."

Wyatt stated that he told Consultech's officials that since the claimants were not terminated and were not discharged for cause, they were entitled to unemployment compensation. He advised that Consultech should not oppose the claims for unemployment compensation since Respondent expected that the claims would be granted. Wyatt denied that he saw the claims of Rodriguez and Torres and stated that Bardelli's response to the claims was incorrect.

Wyatt further stated that he was advised that unemployment hearings may be held concerning the drivers. He instructed McKim that the employees would probably receive unemployment benefits which they were entitled to, and that he should not spend much time or effort contesting their claims. He stated that he specifically instructed Consultech's president not to oppose the claims. Nevertheless, McKim stated that he attended one unemployment hearing at which he testified, but the claimant did not appear.

III. ANALYSIS AND DISCUSSION

A. The Alleged Discharge of the Strikers

The complaint alleges that on August 6, Respondent terminated all its employees who struck work that day.

As set forth above, on August 6, Respondent's employees engaged in a strike for recognition, an economic strike, before

the start of the workday. In the afternoon of August 6, following the withdrawal of the picket line and as the strikers were leaving the premises, they were given a letter which stated that "because you abandoned your job today ... and refused to work, you have been permanently replaced. Your job will be performed by others."

At the time the letter was presented to the strikers no replacements, temporary or permanent, had been hired by Respondent.[6] The most that had been done toward this end was that McKim had given his opinion that replacement drivers must be obtained, and a decision made on Friday or Saturday, as testified by Wyatt, that the drivers' positions be subcontracted to a third party labor source. Admittedly, he did not contact Labor Ready until Sunday, August 8, and those drivers did not begin work until Tuesday, August 10.

The Board has held that advising economic strikers that they had been permanently replaced when they had not been so replaced, constitutes a discharge of the strikers. *Noel Corp.*, 315 NLRB 905, 907–908 (1994); *W.C. McQuaide, Inc.*, 237 NLRB 177, 179 (1978); and *Mars Sales & Equipment Co.*, 242 NLRB 1097, 1101 (1979). The Board stated that "although an employer has the right under *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), to permanently replace economic strikers, this right does not extend to withholding from them the right to return to their unoccupied jobs simply because they have gone out on strike. A false statement that permanent replacements have been obtained accomplishes this unlawful end." *American Linen Supply Co.*, 297 NLRB 137 (1989).

Here, inasmuch as no replacements had been hired at the time the strikers were told that they had been permanently replaced, all the strikers were discharged by the letter of August 6. *Noel Corp.*, supra.

Even apart from the above legal concept, it is clear that Respondent discharged its drivers. Thus, as Respondent's agent Consultech stated in letters in response to the unemployment claims of the drivers, they were "no longer employed for the following reason: Insubordination—work stoppage due to nonrecognition of promotion of union."

B. The Alleged Failure to Reinstate Strikers Upon Their Unconditional Offer to Return to Work

The complaint further alleges that on August 9, Respondent refused to reinstate the strikers when they made unconditional offers to return to work.

It is undisputed that at least 11 strikers returned to Respondent's facility on Monday, August 9 and requested reinstatement to their jobs. They made unconditional offers to return to work, there being no evidence that any conditions were attached to their request for reinstatement. There was no evidence that the other two, Jeans and Ortiz, offered to return to work. Rather, their names were added by McKim to the list of those who requested reinstatement so that a complete list could be established of those employees who were not reinstated or who had not contacted Respondent. I find, with respect to Jeans and Ortiz, that inasmuch as McKim has stated that they were permanently replaced as of August 7, their offer to return to work on August 9 would have been futile. I accordingly place them in the same category as the 11 strikers who made unconditional offers to return to work on August 9 and were denied reinstatement. I also find that inasmuch as they had been unlawfully discharged by the letter of August 6, they were not required to make an offer to return to work. *Abilities & Goodwill*, 241 NLRB 27 (1979).

McKim denied the strikers' offers to return to work, saying that work had already been assigned and the drivers had been sent out. At the time of the request, no Labor Ready drivers had actually begun work. They were scheduled to begin work the following day, Tuesday. On Monday, the work was being performed by former strikers who had been reinstated who had begun work on Saturday, other Respondent drivers from its other locations, and independent contractors from this facility and other Respondent facilities.

In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), the Supreme Court held that an employer having received an unconditional offer to return to work by economic strikers must reinstate such strikers unless the employer can demonstrate a "legitimate and substantial" business justification for refusing to do so.

The hiring of temporary replacements does not excuse the employer's refusal to reinstate economic strikers who made an unconditional offer to return to work. *Zapex Corp.*, 235 NLRB 1237, 1240 (1978). The permanent replacement of economic strikers is a substantial and legitimate business justification for refusing to reinstate former strikers, but it is an affirmative defense and the employer has the burden of proof on that issue. Significant in meeting this burden is an adequate showing that there was a mutual understanding between the respondent and the replacements that the nature of their employment was permanent. *Target Rock Corp.*, 324 NLRB 373 (1997).

It must first be noted that at the time of the offers to return to work on August 9, no Labor Ready employees were employed at Respondent's facility. Only arrangements had been made that they begin work the following day, Tuesday, August 10. Accordingly, the positions of the returning strikers were effectively vacant when they offered to return to work.

The only evidence that the Labor Ready replacements were permanent was given by Wyatt, who asked the Labor Ready manager for employees who would "remain at work" and not work as "day laborers." He asked that the same individuals be sent to work each day. Wyatt, thus, did not state that the Labor Ready drivers were intended by him to be permanent replacements for the striking drivers. Nor was there any testimony by Labor Ready drivers that they understood that their employment was permanent. Thus, on Respondent's evidence there has been no showing that a mutual understanding existed between itself and the employees that they were being hired on a permanent basis. *Harvey Mfg.*, 309 NLRB 465, 468 (1992).

Rather, the evidence shows that the replacements were temporary. Labor Ready is an agency that supplies temporary help to companies. Its services could be terminated on 1-day notice. The fact that Labor Ready, and not Respondent, pays the workers on a daily basis shows the temporary nature of their work. Labor Ready manager Eusebio stated that Labor Ready was not

[6] The question of whether the replacements ultimately hired were permanent or temporary will be addressed below.

asked to provide drivers on a permanent basis. Its system whereby the contracting company must designate each day whether it wants the employee to return to work the following day supports a finding that the workers are temporary. In addition, the records of the five Labor Ready drivers who began work on August 10 show that only one worked continuously thereafter. One other worked through mid-November, and the other three worked only a few days. Their replacements worked briefly and sporadically.

I accordingly find that Respondent has not met its burden of proving that the Labor Ready drivers were permanent replacements for the formerly striking employees.

Even assuming that the Labor Ready drivers were permanent replacements, the strikers were entitled to full reinstatement on the departure of the replacements. *Laidlaw Corp.*, 171 NLRB 1366, 1370 (1968). However, none of the 13 employees were reinstated after the initial Labor Ready hires left their jobs.

I have also considered whether Respondent had an additional substantial and legitimate business justification for refusing to reinstate the strikers. Wyatt testified that he seized on the opportunity presented by the strike to change the nature of the workforce at Teterboro. Nearly all of Respondent's other facilities were manned by independent contractors. Teterboro utilized workers employed by Respondent only because Neuman insisted on that manner of service. When, during the strike, Neuman gave Wyatt permission to operate as he saw fit in order to make Neuman's deliveries, Wyatt decided to subcontract the workforce to a third party, Labor Ready.

First, Wyatt was not entirely consistent in making this decision to subcontract. He immediately reinstated the striking drivers who requested return on Friday night and Saturday following the end of the strike. However, he refused to reinstate the drivers who offered to return to work on Monday after the arrangements with Labor Ready had been made. Accordingly, a definite decision to subcontract all the driver work had not been made. The fact that only part of the driver work was subcontracted when it was Wyatt's decision that all of it should be handled by a third party undermines Respondent's position that its decision to subcontract represented a substantial and legitimate business justification for refusing to reinstate the strikers.

In a similar case, *Land Air Delivery*, 286 NLRB 1131, 1132 (1987), the employees engaged in an economic strike and the employer subcontracted all unit work after the strike began. The Board found that the employer violated Section 8(a)(3) of the Act by failing to reinstate the strikers on their unconditional offers to return to work.[7] The Board stated:

> The Respondent urges that it was within its rights to permanently replace the strikers by contracting out the bargaining unit work without notice to or bargaining with the Union. The flaw in the Respondent's argument is that permanently contracting out the work of unit employees is not equivalent to replacement of one employee by another. With regard to replacing the strikers, the Respondent had two options to assure its continued operation: the Respondent had the right to hire permanent employee replacements, the strikers thereby retaining reinstatement rights in accordance with *Laidlaw Corp.*, or the Respondent had the right to contract out the work temporarily for the duration of the strike, in accordance with *American Cyanamid Co.*, 235 NLRB 1316 (1978). The Respondent's admitted course of action—unilateral permanent subcontracting out of the work—is, absent proof that the options set forth above were unavailable to it, not permissible under the Act. . . . Refusing to afford the strikers their reinstatement rights, in reliance on the unlawful contracting, further violated the Act.

[Citations omitted.]

Here, Respondent undertook neither course of action. It did not hire permanent replacements, and inasmuch as the strike had ended Friday night with the removal of the picket lines and the offers to return to work by the strikers on Friday, Saturday, and Monday, it did not, and could not have contracted out the work temporarily for the duration of the strike. At the time that Labor Ready drivers became employed on Tuesday, Respondent was aware that the strike was over.

It should be noted that *Laidlaw* establishes the reinstatement rights of economic strikers pursuant to which they have an immediate right to recall on the departure of permanent replacements. Even assuming that Labor Ready drivers were permanent replacements, on their leaving their jobs they were replaced by other Labor Ready drivers and not by the strikers who had made offers to return on August 9. This circumstance requires a finding that subcontracting, whereby the subcontractor replaces its workers with others from the subcontracting company, deprives employees of their Section 7 right, under *Laidlaw*, to reinstatement.

I further find that Respondent has not established a sufficient and legitimate business justification for replacing the strikers. If its intent was to provide service to Neuman, that would have been accomplished by the employment of the strikers, following the end of the strike and their unconditional offer to return to work which was made even before Labor Ready's drivers became employed. Indeed, Wyatt stated that he preferred an experienced work force to perform the work. If Respondent's intent was to change the nature of the work force it appears that this has not been completely followed through inasmuch as those drivers who requested reinstatement on Friday and Saturday were reinstated. Moreover, it appears, and I find, that those who were not reinstated when they requested return on Monday were refused reinstatement because they had not offered to return to work prior to that time. In effect, Respondent refused their offers because they engaged in Section 7 protected activity—engaging in a lawful economic strike. Under these circumstances I do not believe that Respondent's use of a subcontractor permitted it to deny economic strikers their right to reinstatement on their unconditional offer to return to work.

C. Respondent's Affirmative Defense

Respondent's answer contained the affirmative defense that the strikers were engaged in unprotected conduct. Its contention is that the strike was not for recognition but was in furtherance of a jurisdictional dispute between Local 418 and other unions.

[7] The Board also found that the employer violated Sec. 8(a)(5) of the Act by permanently contracting out all unit work without prior notice to the union and without affording it an opportunity to bargain.

Neuman Distributors, Inc., has a subsidiary known as Neuman Wholesale Delivery Service (NWDS). Local 418 has represented drivers of NWDS for many years, and has represented the drivers and warehouse employees at the NWDS location in Ridgefield, New Jersey.

In 1998, Neuman operated a Drug Guild distribution facility in Secaucus, New Jersey, employing its own drivers who were represented by Local 807. Local 815 represented the warehouse employees at the Secaucus facility. In March 1998, Neuman subcontracted the Drug Guild work to Respondent. As a result the drivers, formerly represented by Local 807, were laid off. Respondent then performed the driving function at the Secaucus facility with its own drivers who were not represented by any union.

Local 418 unsuccessfully attempted to organize the clerical employees of NWDS at Ridgefield and another location.

In November 1998, Neuman consolidated three of its locations, including Secaucus, into a new facility in Teterboro, the site of the instant dispute. The other consolidated facilities included Glen Rock, where Local 478 represented warehouse employees and Ridgefield, where Local 418 represented drivers and warehouse employees.

At the Teterboro site, Neuman's drivers and warehouse employees, formerly from Ridgefield, who were represented by Local 418 worked alongside Respondent's drivers who were unrepresented and whose wages and benefits were lower than Neuman's employees.

In December and January 1999, Locals 418 and 815 advised Neuman that they sought to represent all the employees at Teterboro. Local 418 also apparently sought to have Neuman terminate Respondent's operations at Teterboro so that all driver work would be performed by Neuman's employees who were represented by Local 418.

In January 1999, Local 418 filed a grievance challenging Neuman's use of Respondent as a subcontractor, and also filed a charge against NWDS concerning the allegedly illegal subcontracting of work to Respondent. Local 418 sought to represent the drivers at Teterboro through such litigation. In March 1999, faced with several claims of representation, Neuman filed RM and UC petitions with the Board. It also filed a CP charge against Local 418 because it threatened to engage in area standards picketing with respect to its claim that clerical employees were not receiving area standards wages.

Thereafter, Local 418 filed a petition with the International Brotherhood of Teamsters in order to resolve the "jurisdictional dispute" between the unions seeking to represent the Teterboro employees. The subject of the dispute was the warehouse employees, who were, prior to the consolidation, represented by Locals 418, 478, and 815. Ultimately, the International Union awarded jurisdiction to Local 418. It is important to note that the drivers at Teterboro, the subject of the instant matter, were not at issue in the jurisdictional dispute.

Respondent argues that the strike occurred with an object of forcing NWDS to terminate Respondent's subcontract so that all driver work would be performed with NWDS drivers who are represented by Local 418. Respondent contends that the strike was in violation of Section 8(b)(4)(D) of the Act, was unprotected, and that such conduct permitted Respondent to lawfully discharge the strikers. No 8(b)(4)(D) charge was filed by Respondent.

In support of its claim, Respondent argues that the strike did not have a recognitional purpose as demonstrated by the fact that the Union did not file a petition to represent its drivers until 3 weeks after the picketing. In addition, Wyatt testified that he learned from NWDS on August 6 that Local 418 was engaged in a dispute with it and with other unions concerning jurisdiction over the Teterboro employees. He was also told that NWDS offered to terminate Respondent's subcontract and pay dues to Local 418 so that it would receive dues payment for the period when it believed it should have been the representative of Respondent's drivers, and then following the termination of the contract, have the operation run by NWDS whose drivers would be represented by Local 418 pursuant to their existing collective-bargaining agreement. According to Wyatt, Pascarella rejected that offer. Respondent argues that this shows that the true purpose of the picketing was to force the ouster of Respondent from the Teterboro facility.

That is not entirely clear. First, the amount of time taken to file a petition is not necessarily indicative of the nature of the picketing. When Wyatt suggested to Pascarella on October 6 that he utilize the Board's election machinery he replied that he was reluctant to do so because of the delays and possible intimidation of employees by Respondent.

Second, if the overriding purpose of Local 418 was to cause the removal of Respondent from the Neuman facility, the Union would have immediately accepted the offer of NWDS to terminate Respondent's contract and receive retroactive dues payments.

Moreover, McKim conceded that at the time of the picketing on August 6 he was not aware of any other organizational drive by any other union seeking representation of Respondent's drivers at Teterboro. He further stated that prior to August 6 he was not aware of the jurisdictional dispute that Local 418 was having with Local 815 over the Teterboro facility.

McKim testified that no strikers were told that they had engaged in illegal conduct by picketing on October 6. The General Counsel and the Union argue that this is additional evidence that they were not discharged because of any illegal activity, but rather were discharged for striking. Respondent's reliance on *Mackay Radio & Telegraph Co.*, 96 NLRB 740, 743 (1951), is misplaced. That case held that employees who participated in an illegal, and not merely unprotected strike which was unlawful from its inception, could be lawfully discharged for such conduct. Respondent correctly notes that the Board stated that in such a situation the strikers could lawfully be denied reinstatement even though the respondent "may have failed to assert the illegality of the strike as the basis for denying reinstatement . . ." However, the facts in *Mackay* and the instant case are completely different. *Mackay* involved a strike which was "unlawful from its inception." Here, the Union engaged in a lawful strike for recognition. Accordingly, the strikers did not forfeit the protection of the Act by engaging in a recognitional strike.

The evidence is clear that the strike was one to achieve recognition of the Union. Shortly before the strike, the employees signed cards authorizing the Union to represent it and agreed

that they would strike for recognition if recognition was refused. After Respondent refused to recognize the Union the employees struck. McKim and Wyatt testified that the strike was for recognition of the Union. Respondent's agent, Consultech, defended the unemployment claims of strikers by stating shortly after the strike that "the claimant is no longer employed for the following reason: Insubordination—work stoppage due to nonrecognition of promotion of union."

I accordingly find that Respondent has not proved its affirmative defense.

CONCLUSIONS OF LAW

1. Consolidated Delivery & Logistics, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 418, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging all its employees who engaged in a strike on August 6, 1999, Respondent violated Sections 8(a)(3) and (1) of the Act.

4. By failing and refusing to reinstate the following employees who unconditionally offered to return to their former positions of employment, Respondent violated Section 8(a)(3) and (1) of the Act:

Jose Balazar	Isaac Rosario
Fabian Guevera	Jose Salinas
Juan Guzman	Richard Silva
Richard Jeans	Jose Torres
David Maldonado	Philip Torres
Luis Ortiz	Miguel Vega
Avelino Rodriguez	

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent unlawfully refused to reinstate economic strikers immediately following their August 9 unconditional offer to return to work, it shall be ordered that Respondent shall offer those employees immediate and full reinstatement to the positions that they held at the time they went on strike or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges. In order to make room for them, the Respondent shall dismiss if necessary, any persons hired in their place. Respondent shall be ordered to make whole these employees for any loss of earnings and other benefits they may have incurred by reason of the Respondent's discrimination against them, including backset from the time of their application to return to work. Backpay, with interest, shall be computed in the manner set forth above.

[Recommended Order omitted from publication.]